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July 7, 2014

Jeff S. Jordan  
Federal Election Commission  
999 E Street, NW, 6th Floor  
Washington DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2014 JUL -8 AM 10:05  
OFFICE OF GENERAL  
COUNSEL

**Re: Response to Complaint, MUR 6821**

Dear Mr. Jordan:

On behalf of Senate Majority PAC ("SMP"), and Rebecca Lambe in her official capacity as treasurer, this letter responds to the complaint filed by the New Hampshire Republican Party and received by SMP on May 23, 2014 (the "Complaint"). The Complaint alleges that a communication paid for by SMP was coordinated with Shaheen for Senate (the "Campaign") and the Democratic Senatorial Campaign Committee ("DSCC") and republished Campaign materials, resulting in a prohibited in-kind contribution to the Campaign. These allegations are premised on inaccurate information, and in any case, the Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971 (the "Act"). The Commission should therefore dismiss this Complaint and close the file.

### BACKGROUND

In late April 2014, SMP began airing an advertisement in New Hampshire describing New Hampshire Senate candidate Scott Brown's ties to the oil industry.<sup>1</sup> SMP created, produced, and disseminated the ad independently of any candidate or political party committee. The ad's script was drafted from scratch, without incorporating any candidate materials:

AUDIO	ON-SCREEN CHYRON
"Scott Brown's carrying some big oil baggage. In Massachusetts, he voted to give oil	Scott Brown: Voted for Big Oil Tax Breaks

<sup>1</sup> See Senate Majority PAC, "Baggage" (Apr. 25, 2014), available at <https://www.youtube.com/watch?v=I2nxJajYjII>.

companies big tax breaks—they make record profits, he collects over four hundred thousand in campaign contributions.”	Scott Brown: More than \$400,000 in Campaign Contributions from Oil & Gas
“Now Brown is shopping for a new Senate seat. Where?”  “In oil-rich Texas?  The oil fields of North Dakota?”	Texas  North Dakota
“Nope, Brown wants to bring his big oil baggage to New Hampshire.”	New Hampshire Scott Brown’s Big Oil Baggage
“Scott Brown: Out for himself and big oil at our expense.”	Scott Brown: Out for himself at our expense
“Senate Majority PAC is responsible for the content of this advertising.”	Paid for by Senate Majority PAC, www.senatemajority.com. Not authorized by any candidate or candidate’s committee. Senate Majority PAC is responsible for the content of this advertising.

The ad’s script was finalized on April 11, 2014, production was complete on April 21, and the ad began airing in New Hampshire the week of April 25.<sup>2</sup>

According to the Complaint, the Campaign posted a message on its website on April 23, 2014,<sup>3</sup> which the DSCC subsequently posted a link to on its Twitter feed.<sup>4</sup> The message, which is still publicly available, reads:

*An Important Message for New Hampshire*

*More attack ads. Paid for by the Koch Brothers and their special interest money.*

*More proof big oil, the Koch Brothers and Wall Street think they can buy our Senate seat for Scott Brown.*

<sup>2</sup> See Contract Agreement Between SMP and WMUR-TV (Apr. 24, 2014), available at [https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%20\(13983630339222\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%20(13983630339222).pdf).

<sup>3</sup> See Complaint at 2.

<sup>4</sup> *Id.* The ‘tweet’ referred to in the Complaint was posted on April 24, 2014. DSCC, Twitter (Apr. 24, 2014 4:45 PM EST), <https://twitter.com/dscc/status/459433019669884929>.

*When Brown was the Senator from Massachusetts he gave big oil and Wall Street billions in special breaks. They gave him millions in campaign contributions.*

*Jeanne Shaheen voted to stop those special breaks.*

*She's leading the fight for a bipartisan bill to lower energy costs for consumers and create jobs.*

*Jeanne Shaheen. Making a difference for New Hampshire.*<sup>5</sup>

Relying on the fact that the Campaign posted this message shortly before SMP's ad was publicly released, and that both the ad and the message discuss Scott Brown's ties to oil interests, the Complaint mistakenly concludes that the message somehow informed the production of the ad. On this basis alone, the Complaint alleges a violation of the coordination rules—specifically, that SMP's advertisement was made at the request of the Campaign and the DSCC, that the Campaign was materially involved in the content of the ad, and that the Campaign engaged in a substantial discussion with SMP by providing SMP with information that was material to the creation of the ad.<sup>6</sup>

The Complaint offers no evidence to demonstrate that the advertisement was coordinated with the Campaign and/or the DSCC. It relies exclusively on the timing of the ad and a thematic similarity between the message and the ad to argue that the Campaign "effectively communicated via their websites and social media material information and requests and suggestions for [SMP]," resulting in a violation of the coordination rules.<sup>7</sup>

The Complaint also alleges that the advertisement republished campaign materials in violation of 11 C.F.R. § 109.23, despite the fact that the ad and the message do not share any of the same written or graphic materials.

## DISCUSSION

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.<sup>8</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.<sup>9</sup>

For a communication to be coordinated with a candidate, authorized committee, political party committee, or any agent of the foregoing, one or more of the conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied.<sup>10</sup> Republication of campaign materials under 11 C.F.R. § 109.23 requires the "dissemination, distribution, or republication, in

<sup>5</sup> See Jeanne Shaheen for Senate, *An Important Message for New Hampshire*, <http://jeannshaheen.org/message/> (last visited July 7, 2014).

<sup>6</sup> See Complaint at 3 (citing 11 C.F.R. § 109.21(d)(1)-(3)).

<sup>7</sup> Complaint at 3.

<sup>8</sup> See 11 C.F.R. § 111.4(d).

<sup>9</sup> See Statement of Reasons, Commissioners Mason, Sandstrom, Smith and Thomas, MUR-4960 (Dec. 21, 2001).

<sup>10</sup> See 11 C.F.R. § 109.21(a).

whole or in part, of any ... written, graphic, or other form of campaign materials ....”<sup>11</sup> Because the Complaint fails to provide facts that show any request, suggestion or assent, substantial discussion, or material involvement on the part of the Campaign, the DSCC, or their agents in connection with the advertisement, and fails to show any reproduction of Campaign materials, the Commission should find no “reason to believe” a violation of the Act occurred.<sup>12</sup>

First, the Complaint fails to show that SMP’s advertisement was made at the “request or suggestion” of any candidate, candidate’s committee, or political party committee.<sup>13</sup> The “request or suggestion” conduct standard is intended to cover only “requests or suggestions made to a select audience, but not those offered to the public generally.”<sup>14</sup> The Complaint offers no evidence of any communication actually directed at SMP. Rather, the alleged “request” was directed to the public at large on the Campaign’s website and was publicly promoted by the DSCC on its Twitter feed. The Commission has specifically rejected finding coordination from this type of activity, explaining that “a request that is posted on a web page that is available to the general public ... does not trigger the [“request or suggestion”] conduct standard ....”<sup>15</sup>

The Complaint likewise fails to allege that the Campaign or DSCC was “materially involved in decisions” regarding any specific aspects of the advertisement or that any “substantial discussion” about the ad occurred. Commission regulations expressly provide that neither of these conduct standards are satisfied “if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”<sup>16</sup> Thus, the Complaint’s argument—that the Campaign and the DSCC “effectively communicated ... material information” to SMP about the ad through a publicly available website and social media account—contradicts the clear terms of the regulations and must fail.<sup>17</sup>

Ultimately, the Complaint can point only to thematic similarities between the ad and the message as evidence of coordination or republication under the Act. But the Commission has roundly rejected this approach, explaining that such similarities are instead “reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination.”<sup>18</sup> Here, there is no indication of prior coordination, and

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<sup>11</sup> *Id.* § 109.23(a).

<sup>12</sup> *Id.* § 109.21(d)(1)–(3).

<sup>13</sup> *Id.* § 109.21(d)(1).

<sup>14</sup> Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 432 (Jan. 3, 2003).

<sup>15</sup> *Id.*

<sup>16</sup> 11 C.F.R. § 109.21(d)(2), (3); *see also* Explanation and Justification, Coordinated Communications, 71 Fed. Reg. 33,194, 33,205 (June 8, 2006) (“a communication created with information found, for instance, on a candidate’s ... Web site ... is not a coordinated communication if that information is subsequently used in connection with a communication.”).

<sup>17</sup> Complaint at 3.

<sup>18</sup> *See* Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner, MUR 5369 at 5 (Aug. 15, 2003).

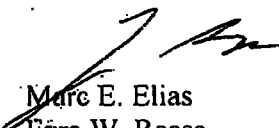
no inclusion of candidate campaign materials that could trigger the Act's republication provision.

Even if its legal argument was not without foundation, the Complaint would still be premised on a mistake of fact that is fatal to its allegations. SMP had already completed the advertisement by April 23, when the Complaint claims the Campaign posted the message on its website, and had already purchased airtime for the ad from television stations by April 24,<sup>19</sup> when the DSCC "tweeted" a link to the Campaign webpage.<sup>20</sup> Thus, there is no way that the message could have informed the content of the ad, as the Complaint contends.<sup>21</sup>

Finally, the Complaint asserts that an investigation into phone logs, conversations, emails and written documents between the Campaign, the DSCC and SMP will confirm that coordination took place; SMP utilizes a firewall to protect it from such speculative allegations. The conduct standards in 11 C.F.R. § 109.21(d) "are not met if [an organization] has established and implemented a firewall" meeting certain requirements.<sup>22</sup> Where such a firewall exists, only "specific information" showing the flow of material information about a candidate's plans, projects, activities or needs to the sponsor is sufficient to defeat the presumption that the conduct standard has not been met.<sup>23</sup> The Complaint does not allege that this flow of material information occurred nor does it present any "specific information" to support such an allegation.

For the reasons set forth, the Commission should dismiss the Complaint and close the file.

Very truly yours,



Marc E. Elias  
Ezra W. Reese  
Daniel B. Nudelman  
Counsel to Senate Majority PAC

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<sup>19</sup> See Contract Agreement Between SMP and WMUR-TV (Apr. 24, 2014), *available at* [https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%201398363.0339222\).pdf](https://stations.fcc.gov/collect/files/73292/Political%20File/2014/Non-Candidate%20Issue%20Ads/Senate%20Majority%20PAC/Senate%20Maj%20PAC%204.24%201398363.0339222).pdf).

<sup>20</sup> See DSCC, Twitter (Apr. 24, 2014 4:45 PM EST), <https://twitter.com/dscc/status/459433019669884929>.

<sup>21</sup> See Complaint at 3.

<sup>22</sup> 11 C.F.R. § 109.21(h).

<sup>23</sup> *Id.*